Nos. 80-11 and 80-15

In the Supreme Court of the United States

OCTOBER TERM, 1980

J. GREGORY MERRION & ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS, et al.,
Petitioners,

v.

JICARILLA APACHE TRIBE, et al.,
Respondents.

AMOCO PRODUCTION COMPANY AND MARATHON OIL COMPANY,
Petitioners,

v.

JICARILLA APACHE TRIBE, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

~~**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE NAVAJO TRIBE OF INDIANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS**~~

and

BRIEF OF THE NAVAJO TRIBE OF INDIANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The Navajo Tribe of Indians is the single largest federally recognized Native American tribe, comprised of approximately 160,000 residents occupying 25,000 square miles of trust land within the states of Arizona, New Mexico and Utah. The tribe possesses extensive energy and mineral resources including coal, oil and uranium among others and has enacted several laws including a sulfur emissions environmental measure, a possessory interest tax and a business activity tax, each of which when implemented will impose costs on corporations operating on tribal lands. The majority of these corporations are non-Navajo. These various laws have been challenged in the federal courts of Arizona, New Mexico and Utah; some are pending in district court, some are on appeal. A central issue in each action is the tribe's authority to subject nonmember lessees of tribal lands to its taxing and regulatory authority. Moreover, the tribe is actively engaged in negotiating and renegotiating leases with numerous mineral, energy, pipeline and other companies. The outcome of this case will directly affect those laws, pending litigation and ongoing negotiations.

SUMMARY OF ARGUMENT

This case reflects a new urgency in clarifying the scope of tribal self-governing authority at a point in history where federal policy has been pressing simultaneously for expanded tribal self-government, accelerated energy resource development, more rigorous environmental controls and increased economic self-sufficiency for tribes. Non-Indian corporations hold extensive mineral exploration and extraction leases on tribal lands negotiated

decades ago by the Bureau of Indian Affairs; these leases were routinely ratified by the tribes, often at a time when tribal government was, at best, nominal. These leases rarely contained provisions for renegotiation, automatic price escalation to reflect market conditions or adequate machinery for enforcing environmental protection or preferential employment policies. Tribal governments, now seeking to assume increased responsibility within the framework of the federal trustee relationship, are enacting various regulatory and revenue generating laws and where federal law requires, these Tribal laws are then approved by the same federal Trustee which negotiated the original lease. Those mineral companies and other non-Indian corporations directly affected by these new assertions of self-governing authority by tribal governments (acting with the approval of the federal government) are being challenged on grounds that will ultimately determine the status and chances of survival of Indian tribes as sovereign dependent nations.

This brief argues that the power to subject foreign corporations to reservation law (including tax and regulatory laws) is an inherent attribute of tribal sovereignty; that this exercise of tribal sovereignty is continuous in nature and cannot be predicated upon a "one-time power to condition entry" which, once granted by lease or contract, is forever frozen in time, diminished and restricted with respect to that "entry"; that, at the very least, tribal sovereignty entails the power to eschew present benefits and forego present income in order to enhance long term chances of survival when the terms of "entry" are found to be inimical to tribal self-determination and survival; and that restrictive interpretations of tribal

authority by this Court will not only thwart congressional mandates toward self-determination but will actually remove incentives toward accelerated development of energy resources which our national energy policy seeks to achieve. Finally, this brief urges that those who have long opposed the constitutionally distinct status of Indian nations have combined in this case with those who seek a windfall from mineral and energy resource extraction to undermine those vital attributes of self-government essential to the survival of Indian nations and maintenance of the federal trust relationship.

I. SOVEREIGNTY NOT PROPRIETORSHIP IS THE JUDICIALLY-RECOGNIZED FOUNDATION FOR THE TRIBAL POWER TO TAX, A POWER TO CONTINUOUSLY CONDITION ENTRY ONTO TRIBAL LANDS.

A recurrent theme in this energy company challenge to tribal sovereignty is that the tribal sovereignty recognized by numerous decisions of this Court is a peculiarly limited sovereignty touching upon only tribal members. The corporate contention is that with respect to nonmembers on tribal lands, the tribe has only the proprietary powers that a right of occupancy provides and not the powers of a sovereign nation. The companies repeatedly characterize tribal powers with relation to nonmembers as "the power to condition entry".

The sovereignty of Indian Tribes encompasses an aspect of territoriality. This has repeatedly been recognized by this Court. *White Mountain Apache Tribe v. Bracker*, _ U.S. _, 100 S.Ct. 2578 (1980) (Federal preemption of state authority over Indian affairs is determined by

reference to the "tradition of Indian sovereignty over the reservation and tribal members." 100 S.Ct. at 2583); *Washington v. Confederated Tribes of the Colville Indian Reservation*, ____ U.S. ____, 100 S.Ct. 2069 (1980) (Recognizing that "Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian Reservation lands in which the tribes have a significant interest." 100 S.Ct. at 2081); *United States v. Wheeler*, 435 U.S. 313 (1978) *quoting United States v. Mazurie*, 419 U.S. 544, 557 (1974) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." 435 U.S. at 323); *Williams v. Lee*, 358 U.S. 217 (1958) (Stating that this Court has "consistently guarded the authority of Indian governments over their reservations." 358 U.S. at 223);

The territoriality aspect of tribal sovereignty is rendered meaningless by the energy companies' insistence that tribes have a right to occupy *but not to govern* lands held for them in trust by the federal government. The Navajo Tribe respectfully submits that tribal sovereignty is the power to govern on tribal lands. Those who enter on Tribal land must expect to comply with Tribal law. They can receive no guarantee that Tribal law will remain static or that changes will not affect them.

For two hundred years national policy has been to protect tribes and, more recently, to promote tribal self-sufficiency and economic development. (*See* Part IV.A. *infra* of this Brief). Since the early nineteenth century this court has encouraged the growth of tribal governments. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Williams v. Lee*, *supra*. The Presidents of the United States now encourage the development of the fledgling commer-

cial economies of once agrarian or nomadic peoples. (*See* Part IV. A. *infra* of this Brief). Subsequent to execution of the leases here involved, national policy reflected in Acts of Congress, authoritative actions of the Executive Branch and judicial opinions has emphasized, authorized and legitimated an expanded exercise of tribal sovereignty as a chosen vehicle to enhance Tribal self-determination and to discharge federal trust responsibilities.

The energy lessees now seek to negate the territoriality aspect of tribal sovereignty by arguing that tribal "self-government" and tribal government of "internal" affairs means Indian sovereignty extends only to *tribal members* on tribal lands. This restriction of tribal sovereignty to tribal members is intended to support the corporate theory that as to nonmembers the tribe's powers are that of a landowner, not of a government. This Court has, however, consistently found that non-members on tribal lands are subject to *sovereign* tribal powers. Thus, in *Williams v. Lee*, *supra*, this Court found that not to require nonmembers to use tribal courts to pursue claims against Indians arising on the reservation "would infringe on the right of the Indians to govern themselves." 358 U.S. at 223. A sovereign, not a landowner, can require use of his courts. The impact of tribal sovereignty on nonmembers was at issue in *Williams v. Lee* and this Court turned a deaf ear to arguments that nonmember status entitled one to special privileges: "It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." *Id.* at 223.

The Navajo Nation respectfully submits that self government is not the power to govern only oneself but rather the power to initiate and implement government

action independently of constraints imposed by a superior authority. Self government as applied to an Indian Tribe is modified to the extent that as domestic, dependent nations, tribes have agreed to abide by the dictates of Congress and to conduct their governments in such a manner as is consistent with their alliance with the superior federal power. Absent a contrary expression of Congress, this alliance with the federal government, will not suffer with the imposition of a tax upon energy production on tribal lands.

Any government to function must have the power to raise revenues needed to pay the costs of governing. As Felix Cohen noted in his treatise *Handbook of Federal Indian Law* (U.N.M. ed. 1942):

> One of the powers essential to the maintenance of any government is the power to levy taxes. That this power is an inherent attribute of tribal sovereignty which continues unless withdrawn or limited by treaty or by an act of Congress is a proposition which has never been successfully disputed.
>
> * * *
>
> The power to tax does not depend upon the power to remove and has been upheld where there was no power in the tribe to remove the taxpayer from the tribal jurisdiction.

At 142 and 143 (footnotes omitted).

This Court has recognized the importance of the power of taxation with relation to state governments: "The power of taxation is *indispensable* to [the states'] existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same

time." *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824) (emphasis added).

This Court's recent decision in *Washington v. Confederated Tribes of the Colville Indian Reservation*, *supra*, recognized that: "The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is *a fundamental attribute of sovereignty* which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." 100 S.Ct. at 2080-81. The language which so incessantly crops up in energy lessees arguments "the power to condition entry" is conspicuously absent from this Court's statement of tribal taxing power as an aspect of sovereignty.

Tax-related decisions of the lower courts either uphold this tribal power on the basis of sovereignty or use sovereignty, not proprietary rights, as the foundation for the "power to condition entry" language. *Fort Mohave Tribe v. County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977) (holding that both a state and tribe could simultaneously impose taxes without double taxation because they were "two different and distinct taxing authorities." 543 F.2d at 1258.); *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F. 2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959), *quoting Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F. 2d 89, 99 (8th Cir. 1956) (upholding tribal power to tax as "an inherent incident of sovereignty"); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 559 (1906) (finding that "The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement

of the United States. It was one of the inherent and essential attributes of its original sovereignty.")

Sovereignty, not simply a right of occupancy, supports the tribal power to condition entry onto its lands.

II. THE COMMERCE CLAUSE HAS NO APPLICATION TO TRIBAL TAXATION OF ENERGY LESSEES IN THE ABSENCE OF CONGRESSIONAL ACTION.

In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) this Court confirmed that Indian Tribes are subject to the dictates of Congress but not to the provisions of the Constitution addressing the balance within state and federal government: "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." 436 U.S. at 56.

The Commerce Clause, art. 1, §8, cl. 3, of the Constitution imbues Congress with the power: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Commerce Clause is a grant of power to the federal Congress and a withdrawal of power from the states. The Commerce Clause does not address or restrict the legislative powers of tribes and under *Martinez* is not, of itself, a constraint on tribal powers.

The energy lessees urge this Court to apply the Commerce Clause as a per se restriction on tribal sovereignty, and, in particular, to apply the Commerce

Clause to tribes as it is applied to states. This contradicts not only *Martinez* but the history of the Commerce Clause as well.

This Court has long recognized that the power of Congress with respect to Indian affairs is of a different nature than the power of Congress over interstate commerce. Thus, although this Court has frequently struck down legislation which attempted to intrude on the exclusive power of Congress to regulate commerce among the states (*e.g.*, the seminal case of *Gibbons v. Ogden, supra*) it has measured tribal laws not by whether they "intrude" on the powers of Congress but by whether the tribal law conflicts with an "act" of Congress restricting the exercise of tribal sovereignty in a particular area (*e.g., Santa Clara Pueblo v. Martinez, supra).* The "exclusive" power of Congress to legislate with respect to Indian affairs is exclusive as to the states not as to the tribes. Tribes are free to legislate in areas of retained sovereignty unless Congress expressly legislates to the contrary. *Santa Clara Pueblo v. Martinez, supra* at 56.

The reference in the Commerce Clause to Indian Tribes originates with the Articles of Confederation of March 1, 1781. The Supreme Court addressed the evolution of the federal power over Indian affairs from these Articles to the present constitutional form in *United States v. Forty-three Gallons of Whiskey,* 93 U.S. 188 (1876) (confirming the federal power to regulate the sale of liquor to Indian Tribes):

> Under the articles of confederation, the United States had the power of regulating the trade and managing all affairs with the Indians not members of any of the States; provided that the legislative right of

> a State within its own limits be not infringed or violated. Of necessity, these limitations rendered the power of no practical value. This was seen by the convention which framed the Constitution; *and Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes,*—a power as broad and as free from restrictions as that to regulate commerce with foreign nations.

93 U.S. at 194 (emphasis added).

The purposeful omission by the constitutional convention of that language permitting state intervention in Indian matters was also recognized by this Court in *Cherokee Nation v. Georgia, supra*, which stated that the Constitutional Convention intended: "[T]o give the whole power of managing those affairs to the government about to be instituted, the convention conferred it explicitly; and omitted those qualifications which embarrassed the exercise of it, as granted in the confederation." 30 U.S. at 13.

Thus, the purpose of the constitutional grant of power to Congress to regulate commerce with the Indian Tribes, the Indian Commerce Clause, was to place all control over Indian matters with the federal Congress and to preclude state interference. This is confirmed by Prentice and Egan in *The Commerce Clause of the Federal Constitution* (1898), *quoted in* Cohen, *Handbook of Federal Indian Law* (U.N.M. ed. 1942) at 91-2 n.22:

> The purpose with which this power was given to Congress was not merely to prevent burdensome, conflicting or discriminating State legislation, but to prevent fraud and injustice upon the frontier, to

> protect an uncivilized people from wrongs by unscrupulous whites, and to guard the white population from the danger of savage outbreaks.
>
> *A grant made with such a purpose must convey a different power from one whose purpose was to insure the freedom of commerce.* Congress has, in the case of the Indians, prohibited trade in certain articles, it has limited the right to trade to persons licensed under Federal laws, and in many ways asserted a greater control than would be possible over other branches of commerce.

At 342 (emphasis added).

The *Martinez* decision and the history of the Indian Commerce Clause demonstrate that tribal taxation is not to be measured by those constitutional standards used to prohibit state interference with freedom of commerce (*e.g.* prohibition of multiple burdens on commerce), but it is instead to be judged by the limitations, if any, imposed on tribes by Congress pursuant to the plenary powers granted Congress by art. 1, §8, cl. 3, of the Constitution. Parts III and IV of this Brief show that Congress has yet to use this plenary power to preempt tribal taxation.

III. THE TRUST RELATIONSHIP IS NOT A PER SE PREEMPTION OF TRIBAL SOVEREIGNTY: THE PURPOSE OF FEDERAL SUPERVISION OF INDIAN AFFAIRS IS TO ENCOURAGE TRIBAL SELF-SUFFICIENCY, NOT TO DESTROY IT.

In *White Mountain Apache Tribe v. Bracker*, 100 S.Ct. 2578 (1980) this Court found that a state tax which

fell upon non-Indians doing business on an Indian reservation was preempted by pervasive federal regulation of the particular business activity. The energy companies place heavy reliance on *Bracker*. The companies contend that the Jicarilla Apache tribal tax, like the state tax in *Bracker*, is preempted by federal regulation of oil and gas leasing on Indian lands. To reach this conclusion they reason first, that federal regulation of energy leases on tribal lands is as comprehensive as the federal timber regulations which were the subject of *Bracker*; second, that the federal laws and regulations intended to *protect* tribes by providing for Interior approval of leases actually operate to *eliminate* tribal self-government with respect to the subject matter of these federal laws and regulations; and third, that tribal leases, once approved by the Secretary, become federal in nature and immune from further tribal action. A review of each of these arguments will show the wisdom of this Court's observation in *Bracker* that:

> The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of the sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law.

100 S.Ct. at 2583.

The reliance of the energy companies upon *Bracker* has been misplaced. First, with respect to their contention that federal timber regulation equates to federal oil and gas regulation, the question becomes one of degree. They key distinction between the two is the pervasive nature of the federal regulations with respect to the day-to-day federal supervision of the harvesting and sale of timber and the more limited nature of the federal regulations with respect to oil and gas leases.

In *White Mountain Apache v. Bracker, supra*, the Court was impressed with the comprehensive nature of the federal supervision of timber harvesting:

> That regulation takes the form of Acts of Congress, detailed regulations promulgated to the Secretary of the Interior, and day-to-day supervision by the Bureau of Indian Affairs.
>
> * * *
>
> Bureau employees regulate the cutting, hauling, and marketing of timber of FATCO and Pinetop. The Bureau decides such matters as how much timber will be cut, which trees will be felled, which roads are to be used, which hauling equipment Pinetop should employ, the speeds at which logging equipment may travel, and the width, length, height and weight of loads.

100 S.Ct. at 2584-86.

By contrast, the federal statutes and regulations upon which the energy companies rely for their preemption argument simply enforce the trust relationship.

The federal statutes which primarily regulate mineral leases and oil and gas leases on reservations are codified in

25 U.S.C. § *et seq.* Section 396(a) is typical of these provisions and merely states that tribal governments may lease mineral lands with the approval of the Secretary of Interior and that the term of such a lease shall not exceed ten years and as long thereafter as minerals are produced in paying quantities. This obviously is not "day-to-day" federal supervision of the ordinary business decisions of the lessees. The Secretary of Interior has issued rules and regulations to enforce these statutes and these are compiled in 25 C.F.R. Subchapter P - Mining. These regulations also provide a method for the payment of royalties, a simple bookeeping matter. Nowhere in these regulations does it appear that the business decisions to be made by the lessee in the ordinary course of its day-to-day business operations are subject to the review of the Secretary acting in his trustees capacity.

The federal regulation of oil and gas leases on Indian reservations is a significantly lesser intrusion by the federal government into the ongoing operations of the lessee than that resulting from the regulation of the harvesting and sale of timber. *Bracker* has no application here.

Equally untenable is the second prong of the companies' *Bracker* argument—that the dependent status of the tribes, expressed by the federal government in its approval of leases and regulation of lessees of tribal lands, is in itself a preemption of tribal governing power with respect to leased tribal lands.

The trust relationship lies at the heart of Indian-United States relations. It was first characterized as such by this Court in *Cherokee Nation v. Georgia, supra*, in which the court found the Indian tribes to be "domestic dependent nations" and observed that: "Their relation to

the United States resembles that of a ward to his guardian." 30 U.S. at 17. The trust relationship has been repeatedly reaffirmed by this Court. *United States v. Kagama*, 118 U.S. 375 (1886) ("From their very weakness and helplessness, so largely due to the course of dealing with the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen." At 384); *United States v. Sandoval*, 231 U.S. 28 (1913) ("[A] long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities." At 46; *United States v. Creek Nation*, 295 U.S. 103 (1935) ("The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government." At 109).

The trust relationship is then the cornerstone of federal Indian policy and if *Bracker* is to be applied wherever federal laws and regulations address activity on Indian lands or relating to trust property, then tribal self-government will be brought to a standstill since little activity exists outside the structure of the trust relationship. Such an expansive view of preemption of tribal taxes by virtue of provision for federal approval of leases is squarely rebutted by this Court's position in *Colville*. There the Court found that an Indian Tribe has the power to tax the activities and property of non-Indians *on trust land*. 100 S.Ct. 2080. Thus, the trust relationship as an integral

aspect of federal Indian policy was recognized by this Court in its prior affirmance of tribal taxation. A relationship intended to nurture tribal governments should not be used to eviscerate them. The trust relationship is not "proof" that Congress does not intend tribes to stand on their own two feet.

Much is made of the fact that the Secretary of Interior has approved the oil and gas leases entered into by the Jicarilla Apache Tribe and the leases are frequently characterized by the energy companies as "federal" as a result of the Secretarial approval.

No energy company has cited this Court to an authority holding that a lease entered into by a tribe and reviewed and approved by the Secretary of Interior acting in his trustee capacity is from that day forth a federal rather than a tribal lease. Moreover, in *Colville* this Court refused to find that the mere fact of Secretarial approval of tribal tax laws was sufficient to preempt state tax laws. 100 S.Ct. at 2082. Secretarial approval of oil and gas leases is, similarly, a simple incident of the trust relationship. The leases remain tribal leases and the Secretarial approval has no preemptive bearing on the tribes retained sovereign power to levy a tax upon the lessee.

This is not the first time that an oil and gas company has sought to escape taxation for activities on tribal lands. In *Heiner v. Colonial Trust Co.*, 275 U.S. 232 (1927) an oil lessee of tribal lands sought to avoid the federal income tax. The Court first observed that the "lease was in the form prescribed by the Secretary of the Interior and was approved by him" (275 U.S. at 233) and then found that the "power of the United States to tax the income is undoubted." (275 U.S. at 234.) In numerous decisions of the

lower courts the argument has been made that federal regulation of lessees of tribal lands preempts state taxation of the lessee. This argument has met with uniform rejection. *Crow Tribe of Indians v. State of Montana*, 469 F.Supp. 154 (D. Mont. 1979) ("In the instant case, however, there is no body of federal law either governing the method by which coal underlying reservation lands is to be taxed or immunizing non-Indian lessees from the application of state law." At 163); *Fort Mojave Tribe v. County of San Bernandino, supra*, (holding the California possessory interest tax applicable to tribal lessees); *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1171), *cert. denied*, 405 U.S. 933 (1972).

The federal district court for the District of New Mexico addressed the issue in *Norvell v. Sangre de Cristo Development Co.*, 372 F.Supp. 348 (D.N.M. 1974) *rev'd on other grounds*, 519 F.2d 370 (10th Cir. 1975):

> "A nondiscriminatory state tax levied upon the defendant company, organized as it is for profit and *only incidentally performing a federal function by leasing from Indians*, is proper. The Company does not become a federal instrumentality by virtue of the lease. Nor does such a tax do violence to the governmental powers of the pueblo.
>
> "There is, further, no federal statute which forbids the imposition of this state tax upon the leasehold interest, and there can be no assumption that Congress intended to create an immunity for the lessees."

375 F. Supp. at 358 (emphasis supplied, footnote omitted).

There is simply no relationship between federal approval

or current regulation of lessees of tribal lands and the inherent power of an Indian tribe to tax activities and property on trust land. One does not preempt the other.

IV. IF THE NATIONAL ENERGY POLICY MUST BE BALANCED AGAINST EXPRESSED CONGRESSIONAL GOALS OF TRIBAL ECONOMIC GROWTH, IT IS FOR CONGRESS TO MAKE THAT BALANCE.

A. Federal Indian Policy Encourages Tribal Economic Development.

In *Washington v. The Confederated Tribes of the Colville Indian Reservation, supra,* this Court found that tribal sovereign powers were divested by their dependent status where "the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government," 100 S.Ct. 2069, 2081, and observed that as to tribal taxation of the sale of cigarettes "we can see no overriding federal interest that would *necessarily* be frustrated by tribal taxation." *Id.* at 2081 (Emphasis added.)

The energy companies' challenge to the Jicarilla Apache oil and gas severance tax is based in part on their belief that domestic energy development is an overriding federal interest necessarilyincompatible with and superior to tribal taxation. To invalidate tribal taxes on this ground, the Court must ignore the existence of an equally significant federal commitment to tribal economic development or must find the energy policy preemptive of the federal Indian policy where a conflict is noted.

This Court has on numerous occasions taken judicial notice of recent congressional and Executive actions affirming the importance of tribal economic development and the centrality of reaffirming tribal sovereignty as the foundation of enhanced tribal self-determination. Thus, in *White Mountain Apache v. Bracker, supra*, this Court stated: "As we have repeatedly recognized, this tradition [of Indian sovereignty over the reservation and its members] is reflected and encouraged in a number of congressional enactments demonstrating *a firm federal policy of promoting tribal self-sufficiency and economic development.*" 100 S. Ct. at 2583-84 (emphasis added).

The *Bracker* opinion noted recent acts of Congress intended to better the economic condition of the Indian Tribes including the Indian Financing Act of 1974, 25 U.S.C. §1451, *et seq.;* the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §461 *et seq.;* and the Indian Reorganization Act of 1934, 25 U.S.C. §450 *et seq.* 100 S.Ct. at 2583-84.

The support of the Courts and Congress for Indian sovereignty, economic self-sufficiency and self-determination has been encouraged and reaffirmed by the Executive Branch. President Richard M. Nixon in a July 8, 1970, Message to Congress set forth "Recommendations for Indian Policy":

> The time has come... to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.
>
> * * *
>
> Economic deprivation is among the most serious of Indian problems. [I]t is critically important that that

> the Federal government support and encourage efforts which help Indians develop their own economic infrastructure.
>
> * * *
>
> [I]t is essential that the Indian people continue to lead the way by participating in policy development to the greatest possible degree.

H.R. Doc. No. 91-363, 91st Cong., 2d Sess. (1970).

President Nixon's statement echoed the sentiments of President Lyndon B. Johnson's Message to Congress, "The Forgotten American," urging passage of the Indian Civil Rights Act. 114 Cong. Rec. 5518, 5520 (1968). Furthermore, President Reagan in a pre-election message to the Indian peoples gave reassurance that the economic development of the Indian tribes would be a goal of his administration: "Economic self-sufficiency will be a goal of my Administration, both in Indian affairs and in the nation at large." Clary Institute *quoted in* The Navajo Times, Oct.30, 1980 at B-5, Col.7.

Recognition by the Courts, the Congress and the Executive of the firm federal policy of promoting Indian economic development obliges the energy companies to demonstrate a basis for asserting that policy is necessarily incompatible with a commitment to domestic development of energy resources so as to preempt all exercise of residual tribal sovereignty that might conceivably decrease the profit margins of energy resource developers by increasing the return available to the tribes as energy resource owners. The Court has been traditionally reluctant to arrogate such a role for itself: "[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the

absence of clear indications of legislative intent." *Santa Clara Pueblo v. Martinez, supra*, at 60.

B. The National Energy Policy Has Survived Federal, State and Local Taxation of Energy Companies and Can Survive Tribal Taxation As Well

The spectre of oppressive tribal taxation destroying the energy policies recently implemented by Congress is forcefully asserted but not substantiated by the reluctant taxpayers. Tribal taxation, the energy companies urge, will be an impossible "unknown" for Congress in formulating and implementing a national energy policy. Furthermore, the companies argue tribal taxation of nonmembers has no political restraints and is certain to be exercised in such an oppressive and confiscatory manner as to endanger the future of energy production and threaten the national energy supply.

There is no "inherent" extreme danger to our national interests in the taxation of oil and gas production or, presumably, the federal and state governments would have refrained from tapping this source of income. It is difficult to give much credence to corporate concerns that Congress, which adjusts to the multitude of state taxes imposed on energy production,somehow cannot similarly cope with tribal taxes. If Congress does have difficulty structuring a national energy plan in light of tribal taxation, then it has plenary power derived from the trust relationship and the Indian Commerce Clause to promulgate guidelines for tribal tax programs or, in the extreme case, to abolish the tribal taxing power altogether.

As to the oppressive nature of tribal taxation, the

lessees' fears are again unjustified. The Indian Tribes have few sources of revenue with which to support their people. Rare indeed would be the tribal government which deliberately drove away from reservation lands what little source of employment might exist. Just as the states and federal government are sensitive to the practical economics of taxation, so too the Indian Tribes will strive to protect, not destroy, the proverbial goose. The American Indian Policy Review Commission's *Final Report* (1977) stated the obvious:"It is difficult to imagine that any tribal government would attempt to enact and administer a tax provision without looking into its relative merits and costs versus benefits." At 180.

Further protections afforded the energy companies from any possible abuse of the tribal taxation power are set forth in Part V of this Brief.

C. Whether Tribal Economic Self-Sufficiency Must Yield to a National Energy Policy Is a Political Question More Appropriate for Congress than for the Courts.

In the present case, the Court is asked to determine whether federal energy policy or federal Indian policy is the greater federal interest. This sort of determination is a nonjusticiable issue falling squarely within the political question doctrine described by the Court in *Baker v. Carr*, 369 U.S. 186 (1962).After emphasizing the importance of the political question doctrine with relation to Indian Tribes, the Court set forth various formulations for discerning a political question which included: " A textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for

resolving it." 369 U.S. at 217.

The Commerce Clause is a "textually demonstrable constitutional commitment" of Indian sovereignty issues to Congress. While no precise language addresses energy matters, Congress is also imbued with the power to regulate commerce among the states and to preserve the welfare of the country. Certainly there is no "judicially discoverable and manageable" standard for resolving a controversy as to whether Indian sovereignty or oil is of greater national concern.

The Jicarilla Apache severance tax was enacted in 1977. The taxes of the Navajo Tribe were enacted in 1978. Congress has yet to pass legislation exempting energy lessees from tribal taxation and, given the significance of this country's federal Indian policy, it would be inappropriate to simply assume that domestic energy bills were intended to override tribal economic growth. If that decision is to be made, it is for Congress, not the courts, to make it.

V. THE ENERGY CONGLOMERATES NEED NOT FEAR THE "AWESOME" POWERS OF THE NATIVE AMERICAN: CONGRESS, THE INDIAN CIVIL RIGHTS ACT AND NORMAL POWERS OF POLITICAL PERSUASION OFFER PROTECTION.

The energy lessees urge that tribal taxation necessarily results in oppressive and confiscatory measures. Congress, however, possesses full powers to legislate with relation to the exercise of Indian sovereignty and has done so where it deemed necessary. *See, e.g.* The Indian Civil Rights Act, 25 U.S.C. §1301 *et seq.* This plenary power has

been variously attributed by this Court to the Indian Commerce Clause, art. I, §8, cl.3, of the Constitution or to the trust relationship or to both. *Williams v. Lee, supra*, at 219 n.4. As this Court stated simply in *Santa Clara Pueblo v. Martinez, supra* at 56: "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." (Citations omitted.)

The energy companies are not lacking a forum should tribal taxation become "oppressive" or "confiscatory": Congress controls the exercise of tribal sovereignty and could impose regulations on tribal taxation or permit federal review of tribal tax laws should the need arise.

The energy companies have also voiced a strong concern as to the even-handedness of tribal taxation of nonmembers. This concern is met by the Indian Civil Rights Act, 25 U.S.C. §1301 *et seq.* which, in pertinent part, provides: "No Indian tribe in exercising powers of self-government shall--(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. §1302. The impact of this federal statute on tribal government is examined by this Court in *Santa Clara Pueblo v. Martinez, supra:*

> Moreover, contrary to the reasoning of the court below, implication of a federal remedy in addition to habeas corpus is not plainly required to give effect to Congress'objective of extending constitutional norms to tribal self-government. Tribal forums are available to vindicate rights created by the ICRA, and §1302 has the substantial and intended effect of changing the

> law which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.

436 U.S. at 65 (footnotes and citations omitted).

The corporate lessees of tribal lands seek to avoid *Martinez* by urging that tribal forums will be biased in favor of tribal laws and that federal rights will be determined with finality by the tribal courts. Neither argument has merit.

There is no inherent prejudice in the common practice of a court determining the validity or application of the laws of its own government and tribal courts should similarly be accorded the right to determine the validity and effect of tribal laws. The most egregious element of the energy companies' contention that the Indian Civil Rights Act is "certain" to be abused by tribal courts is that not one of these companies has shown the court that it has even attempted to use the tribal judicial process to challenge "abusive" tribal taxation, much less failed to obtain satisfaction from it.

The companies express further concern that fair consideration is impossible for them because tribal governments may not have a clear separation of legislative, executive and judicial functions. *Martinez*, however, directs tribal *forums*, not simply courts, to apply the principles set forth in §1302 and finds that: "Non-judicial tribal institutions have also been recognized as competent law-applying bodies." 436 U.S. at 66. A blend of governing powers is not an automatic loss of impartiality. The British

Parliament, for example, is the "court" of last resort in that system without any apparently disasterous results.

The second argument, that federal rights will be determined with finality in tribal forums, is equally specious. This is premised on a false assumption that a tribal lease which complies in its terms with federal regulations and which is approved by the Secretary of the Interior acting as trustee for the tribe is actually a federal lease. In any event, the companies can appeal to Congress or, in certain instances, to the Secretary of Interior. *Santa Clara Pueblo v. Martinez, supra* at 66 n.22.

The energy companies have further expressed grave concern that their inability to vote in tribal elections will remove any constraints the tribal government might otherwise have with respect to the level of taxation to be imposed. These companies do not, of course, actually vote in any election be it tribal, state or federal. Their employees, however, are likely to be tribal members who can vote in tribal elections and who have a high stake in the continued productive activity of their employer—the scarcity of employment on Indian reservations is a well-documented fact. American Indian Policy Review Commission, *Final Report* at 92-3 (1977).

Neither at home nor abroad does lack of suffrage seem to operate as a significant deterrent to public awareness of the concerns of energy companies.

CONCLUSION

The resolution of issues raised by the present impact of tribal laws on nonmember energy lessees need not rest upon static concepts of tribal sovereignty, property conveyance or the federal trust relationship. The issues now before this Court arise at a time where national policy has moved towards equating tribal sovereignty with tribal self-determination, at a time where changing market conditions have injected an issue as to whether tribes may, with the approval of the federal trustee, share equitably with their energy lessees in windfall profits, and at a time where the evolving trust relationship has moved toward tribal initiatives subject to limited federal review. These circumstances, the Navajo Tribe respectfully submits, compel a determination that the tax laws of the Jicarilla Apache Tribe are valid.

For the foregoing reasons the Tenth Circuit's opinion should be affirmed.

Respectfully submitted this 22nd day of January, 1981.

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CERTIFICATE OF SERVICE

I, George P. Vlassis, attorney for the amicus curiae and a member of the bar of this court, certify that all parties required to be served have been served with the foregoing motion and brief; specifically that on January ___, 1981, I caused to be deposited in a United States Post Office at Phoenix, Arizona, with air mail postage prepaid, three copies of the foregoing motion and brief of amicus curiae addressed to each of the following:

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